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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 295

LEGH R. POWELL, JR. AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF THE SEABOARD AIR LINE RAILROAD COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The majority and dissenting opinions of the specially constituted District Court (R. 327–342) are reported in 12 F. Supp. 938.

The report and order of the Interstate Commerce Commission (R. 9–20) are reported in 206 I. C. C. 362.

JURISDICTION

The final decree of the District Court was entered on June 4, 1935 (R. 342). Petition for appeal was filed on July 19, 1935 (R. 345) and was allowed on July 23, 1935 (R. 349-350). The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. C. Tit. 28, Sec. 47, and U. S. C. Supp. VII, Tit. 28, Sec. 47 (a)), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (U. S. C. Supp. VII, Tit. 28, Sec. 345).

QUESTIONS PRESENTED

1. Should the bill of complaint have been dismissed because the order of the Interstate Commerce Commission is not a reviewable order under the Urgent Deficiencies Act?

2. Was the tariff which the Commission struck from its files such a tariff as was lawfully entitled to be filed with the Interstate Commerce Commission under Section 6 of the Interstate Commerce Act?

3. Did the Commission exceed its authority by striking appellants' tariff from the files?

4. Does the Commission's order lack the requisite certainty and precision necessary to validity?

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the appendix (*infra*, pp. 63–67).

STATEMENT

This is an appeal from a decree of a specially constituted three judge District Court for the Southern District of Georgia dismissing appellants' bill of complaint in an action brought to enjoin and annul an order of the Interstate Commerce Commission, which struck from the Commission's files a tariff filed by appellants, and issuing an injunction against appellants on the prayer of the Receiver of the Central of Georgia Railway, an intervener in this suit.[1]

Fort Benning, Georgia, is a government military post where the infantry and tank schools of the United States Army are situated (R. 2, 282). It covers some 98,000 acres and has a population of between 7,500 and 8,000 people; also, about 1,000 head of livestock are situated at the post (R. 282). The Fort is about ten miles from Columbus, Georgia, and about six miles from Fort Benning Junction, Georgia (R. 52, 221). The lines of the Seaboard Air Line Railway (hereinafter called the Seaboard) and the Central of Georgia Railway (hereinafter called the Central) pass through Fort

[1] This case in reality is the culmination of two different proceedings before the Interstate Commerce Commission. Appellants were not parties to the first proceeding, which was entitled Finance Docket No. 9709 and which is reported as *Fort Benning R. Co. Acquisition*, 193 I. C. C. 223, 193 I. C. C. 517. That proceeding is of interest in this case only because most of the pertinent facts here involved were developed in that proceeding and the record therein was made a part of the evidence in the instant case (R. 181–182).

Benning Junction, which is their nearest approach to Fort Benning (R. 2, 52, 199–200). To connect the Fort with the lines of the Seaboard and the Central, the government in 1918 built a railroad approximately 6.8 miles long from Fort Benning to Fort Benning Junction (R. 52, 221). At the terminus of that line at the Fort the government constructed some three miles of switching, receiving, and delivery tracks, together with shops and facilities for the operation of the railroad (R. 52, 221).

There is no industry within the confines of Fort Benning, but a large amount of freight moves to and from the Fort (R. 14, 52, 282–283). This freight, which aggregates about 2,800 cars a year, consists of coal, gasoline, oil, ammunition, subsistence, clothing, household goods, and other freight, including a considerable amount of building material hauled for private contractors who are erecting buildings at the Fort under a program which will continue through 1940 (R. 209, 282–283).

For several years after the line was completed it was operated by government employees with government-owned motive power under the direction of the War Department. This arrangement proving unsatisfactory, the government licensed the Central by revocable license dated June 15, 1924, to operate the line from Fort Benning Junction to Fort Benning. Under this license the Central handled all cars moving to or from Fort Benning, but

the government continued to do the intra-terminal switching at the Fort. The Central was compensated by being allowed to establish certain arbitraries over and above its through rates for performing the services rendered (R. 52–53, 221–222).

This arrangement continued until September 2, 1932, when the Secretary of War issued an order, effective thirty days thereafter, revoking the license held by the Central. However, prior to the revocation of the Central's license, Henry A. Page, Jr. and C. F. Harris submitted to the War Department a proposal for the operation of the government line between Fort Benning and Fort Benning Junction. This proposal was accepted and since October 18, 1932, the line, together with the intra-terminal tracks at the Fort, has been operated by Page and Harris as private contractors under an agreement dated October 16, 1932 (R. 222–223). Under this agreement Page and Harris were given the right to use the equipment and facilities owned by the government, and they leased the tracks from the government at an annual rental of $100.00. The government agreed to pay Page and Harris $1,000.00 per month for doing the intra-terminal switching and $5.00 for each loaded car moved to or from Fort Benning Junction (R. 223, 186–195).

The operating agreement between the government and Page and Harris was originally intended to be a temporary arrangement and it was contemplated that Page and Harris would seek the

permission of the Interstate Commerce Commission to operate as a common carrier (R. 223). Subsequently Page and Harris did apply to the Commission for a certificate of public convenience and necessity authorizing them to operate as common carriers (R. 182–185, 220–221). This application was filed on November 5, 1932 (R. 220) and gave rise to an earlier proceeding (referred to in the footnote, *supra,* p. 3) before the Interstate Commerce Commission. That proceeding is known as Finance Docket No. 9709 and the record therein is made a part of the record in the present case (R. 181–182).

The Commission conducted hearings on the application of Page and Harris, and in June 1933 Division 4 of the Commission issued a report approving the application (R. 220–228). The Central, which had appeared as an interested party before the Commission and resisted the granting of the application, petitioned for a reargument and reconsideration before the entire Commission (R. 229). This petition was granted and on October 4, 1933, a report was issued reversing the decision of Division 4 and dismissing the application of Page and Harris (R. 229–233).

The Commission's report indicates that the reason for this action was the Commission thought that if the line from Fort Benning Junction to Fort Benning became a common carrier, the revenues of the Central and the Seaboard would be

endangered and impaired by the establishment of joint rates to Fort Benning. The Commission also indicated that it was of the opinion that the benefits accruing to Page and Harris by such an arrangement would not be commensurate with the service rendered by them or the cost of rendering that service. (R. 229–232.) After the Commission's denial of their application, Page and Harris continued to operate the line between Fort Benning and Fort Benning Junction as private contractors under the original lease and contract (Exhibits 38, 39; R. 165). During the period from October 16, 1932, to November 1933 railroad rates were not quoted to Fort Benning but only to Fort Benning Junction.

In November 1933 the Seaboard filed a tariff which gave rise to the subsequent proceeding before the Commission and the instant case before this Court. That tariff is identified as "I. C. C. A–6826, Sixth Revised, page 139," and provides that the switching limits of the Seaboard Railway at Fort Benning Junction shall include the receiving and delivery tracks at Fort Benning (R. 20–A). The effect of the tariff is that Fort Benning Junction and Fort Benning, a point some six miles from the tracks of the Seaboard at Fort Benning Junction, are to be treated as one point for rate-making purposes.

The means by which the Seaboard proposed to reach Fort Benning, and which it has subsequently used for that purpose, was to transfer shipments

at Fort Benning Junction to Page and Harris for transportation by the latter as the Seaboard's agent to Fort Benning, and to pay Page and Harris for such transportation at rates provided by a contract of June 7, 1934 (R. 21–25), between the Seaboard and Page and Harris which sought to establish such an agency. In substance this contract between the Seaboard and Page and Harris provides that Page and Harris are to receive $12.50 per car on all cars bringing the Seaboard revenue of $25 or more, and one-half of the total revenue to the Seaboard on all cars bringing the Seaboard a revenue of less than $25 (R. 21–25). In this connection it should be noted that private contractors at Fort Benning are also required to pay Page and Harris $5 per car for intra-terminal switching of all cars consigned to such private contractors arriving over the Seaboard (R. 118).

The Central has not established any similar tariff or made any contract with Page and Harris. However, so far as relates to consignments moving on government bills of lading, the Central has an informal arrangement with the government whereby it turns over such consignments to Page and Harris at Fort Benning Junction and pays to Page and Harris for the transportation of such consignments from Fort Benning Junction to Fort Benning $12.50 per car on cars bringing the Central a revenue of $25 or more and one-half of the total revenue to Central on cars bringing it less than $25

(R. 12, 95, 118). This arrangement was for the purpose of making it possible for the Central to retain a portion of the government business at Fort Benning. So far as relates to shipments moving to Fort Benning on private bills of lading, the Central delivers these to the consignee at Fort Benning Junction, leaving the consignee either to compensate Page and Harris for the further transportation from Fort Benning Junction to Fort Benning or to provide other means of transportation as the consignee sees fit.

The proceeding before the Commission which is directly involved in this case was initiated by a complaint filed on behalf of the Central on May 1, 1934, against appellants and Page and Harris. The complaint alleged that the tariff filed by the Seaboard and the services rendered thereunder were unlawful, and requested the Commission to cancel the tariff (R. 26–36).

After full hearing and argument the Commission, on February 5, 1935, issued the report and order herein sought to be enjoined. On the basis of the evidence before it, the Commission found that the Seaboard, by filing the tariff in question, had filed a tariff to a point not on its lines.[2] The

[2] More explicitly stated, the Commission found that the tariff was not an offer of a mere "off track" terminal service such as pick-up and delivery service, but was, in fact, an offer of a further and additional line-haul service under circumstances set forth, *infra*, at pp. 27–30.

Commission concluded that such a tariff was not a proper tariff within the meaning of Section 6 of the Interstate Commerce Act and accordingly issued its order in the following language: "It is ordered, That Sixth Revised Page 139 of said schedules be, and it is hereby, stricken from the files of this Commission" (R. 9–20).

The Commission also found in its report that the tariff covered a service which was prohibited by Section 1 (18) of the Interstate Commerce Act because it amounted to an extension of the lines of the Seaboard without the necessary certificate of convenience and necessity. However, the Commission did not base its order on that finding, but concluded that the tariff should be stricken from the files because it was not such a tariff as may be filed under Section 6 of the Interstate Commerce Act.

On February 19, 1935, appellants petitioned the Commission for a reargument and reconsideration of the order. On March 4, 1935, the Commission, without further report, denied the petition for reargument and reconsideration (R. 39–40).

On March 21, 1935, appellants filed their bill of complaint in the United States District Court for the Southern District of Georgia, asserting that the tariff in question was lawful, that the Commission's order and the report incorporated therein were based on erroneous principles of law and exceeded the lawful power of the Commission, and praying, among other things, for a decree per-

petually enjoining the enforcement, operation, and execution of the order and that it be set aside and annulled (R. 1–8). A specially constituted three-judge court was convened under the provisions of the Urgent Deficiencies Act to hear the case (R. 40).

By authority of Sections 212 and 213 of the Judicial Code, 36 Stat. 1150, U. S. C. A., Tit. 28, Sec. 45 (a), the Interstate Commerce Commission and H. D. Pollard, as Receiver of the Central, intervened as defendants (R. 44, 49). Certain parties affected by the Commission's order also intervened in support of the bill of complaint; but an order of severance having been entered, they are not parties to this appeal (R. 350). As part of his answer, Pollard filed a counterclaim praying that appellants and their agents be enjoined from performing service from Fort Benning Junction to the Fort and from using the tariff in question without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity as required by Section 1 (18) of the Interstate Commerce Act (R. 49–72). Appellants filed a motion to strike the counterclaim on the grounds that it did not set up a proper counterclaim in relation to appellants' suit and that the specially constituted court was without jurisdiction over the issues presented by the counterclaim (R. 72–77).

The District Court heard the case on the record as made before the Interstate Commerce Commis-

sion. By final decree that court dismissed appellants' bill of complaint and, overruling appellants' motion to strike the counterclaim, issued the injunction as prayed by appellee Pollard (R. 342–344). From that decree this appeal was prosecuted.

ARGUMENT

The United States and the Interstate Commerce Commission, two of the appellees on this appeal, are parties in this suit for the sole purpose of defending the order of the Commission and that part of the decree of the court below which dismisses appellants' bill of complaint and sustains the Commission's order. Neither of these appellees has any interest in the counterclaim which was filed and prosecuted by H. D. Pollard, the Receiver of the Central of Georgia Railway, who is also an appellee in this case. Consequently, this brief is directed solely to the question of whether or not the bill of complaint should have been dismissed by the court below.

I

THE BILL OF COMPLAINT SHOULD HAVE BEEN DISMISSED BECAUSE THE ORDER OF THE INTERSTATE COMMERCE COMMISSION IS NOT A REVIEWABLE ORDER UNDER THE URGENT DEFICIENCIES ACT

On February 5, 1935, the Interstate Commerce Commission issued its report and order in this case (R. 9–20). Omitting the preliminary formal statement, the order reads (R. 20):

> It is ordered, That Sixth Revised Page 139 of said schedules, be, and it is hereby, stricken from the files of this Commission.

The order was not directed to any party. It required no one to do or refrain from doing any act; it could not be enforced against any one; and, *a fortiori*, it could not be obeyed or disobeyed by any one. The order did not speak to the future or contemplate any future effect because, on and after February 5, 1935, the order had no significance except as a record of a certain completed act performed by the Commission.

On March 21, 1935, appellants filed their bill of complaint requesting that a statutory three-judge court be convened in accordance with the provisions of the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), and that such court enter an order "forever enjoining the enforcement, operation, and execution" of the Commission's order and requiring the same to "be set aside and forever annulled" (R. 1, 8). Thereafter a three-judge court was convened to hear the case (R. 40). The first defense interposed by the United States was that the bill of complaint did not state any cause of action cognizable in that court (R. 41–42). The court overruled that defense and stated that this was an affirmative order having an affirmative effect and that it was subject to review under the decisions of this Court in *United States* v. *New River Co.*, 265

U. S. 533; *Alton R. Co. v. United States*, 287 U. S. 229; and *Intermountain Rate Cases*, 234 U. S. 476.

It is submitted that in so ruling the court misconstrued the applicable decisions of this Court and transgressed the statutory limits of its own jurisdiction.

The jurisdiction of a statutory three judge court to review orders of the Interstate Commerce Commission is derived from the express provisions of the statutes and therefore is limited by the scope of those provisions. Jurisdiction to review such orders was originally conferred upon the Commerce Court by the Commerce Court Act of June 18, 1910, c. 309, 36 Stat. 539, which provided:

> That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:
>
> *First*. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.
>
> *Second*. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

By the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, the Commerce Court

was abolished and its functions were transferred to the several district courts to be performed under the procedure provided in that Act.

For the first nineteen years of the Commission's existence, its orders could not be enjoined by a court. In 1906, when the quasi-legislative function of rate-making was delegated to the Commission, Congress provided for judicial review of such orders by injunctive process.[3] Obviously, the intent of Congress was to set up expeditious machinery to satisfy the constitutional requirements for judicial review of quasi-legislative orders issued by the Interstate Commerce Commission. Typical of such quasi-legislative orders are those issued under Sections 3, 13, and 15 of the Interstate Commerce Act. Such orders prescribe reasonable, non-discriminatory, and non-preferential rates, rules, or practices for the future. Cf. *United States* v. *Illinois Central R. R.*, 263 U. S. 515; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Merchants Warehouse Co.* v. *United States*, 283 U. S.

[3] In *United States* v. *Los Angeles R. R.*, 273 U. S. 299, this Court said (p. 309):

> The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, * * *. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, * * *; and, when that Court was abolished, to the district courts, by the Urgent Deficiencies Act.

301; *United States v. Pennsylvania R. R.*, 266 U. S. 191; *Assigned Car Cases*, 274 U. S. 564; *Houston & Texas Ry. v. United States*, 234 U. S. 342; *Los Angeles Switching Case*, 234 U. S. 294; *Louisville & N. R. Co. v. United States*, 282 U. S. 740.

Disobedience of such an order of the Commission is punishable by heavy penalties. It will be noted that Section 16 (8) of the Interstate Commerce Act provides that any carrier "who knowingly fails or neglects to obey any order made under the provisions of Sections 3, 13, or 15 of this part shall forfeit to the United States the sum of $5,000 for each offense."

The protection which was given to persons affected by such orders was an expedited proceeding in equity before a specially constituted court of three judges and a direct appeal to this Court so that the validity of the Commission's orders issued under Sections 3, 13, and 15 of the Act might finally be adjudicated without delay. The very nature of this procedure indicates that Congress not only intended to give the public the earliest possible benefit of such orders but to afford carriers ample opportunity of questioning the orders without subjecting themselves to severe penalties *for failure to obey the orders.*[1]

---

[1] The Interstate Commerce Act contemplates that all reviewable orders shall be reviewed with the least possible delay and with maximum protection to the persons affected by such orders. The procedure for review of the Commission's order is prescribed in U. S. C., Tit. 28, Sections 47 and

Obviously this extraordinary remedy cannot be invoked unless there has been an order issued by the Commission. *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *United States* v. *Corrick*, 298 U. S. 435. But as this Court pointed out in *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309, although the statute gives the statutory court jurisdiction over "any order," nevertheless "there are many orders of the Commission which are not judicially reviewable." In *Procter & Gamble* v. *United States*, 225 U. S. 282, it was held that the words "any order" do not include an order of the Commission which dismissed a complaint. This holding was followed in *Hooker* v. *Knapp*, 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United*

47a, which provides as follows: Suits to enjoin such orders are to be heard before district courts of three judges, one of whom shall be a circuit judge, and an injunction may be granted on the concurrence of two judges. An application for an injunction may be heard after five days' notice has been given to the Attorney General of the United States and the Interstate Commerce Commission. The Act requires that the hearing on such application shall be given precedence and shall be in every way expedited and shall be assigned for hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States from any decree granting or denying an interlocutory injunction in such case if the appeal is taken within thirty days. Any final judgment or decree may be reviewed directly by the Supreme Court of the United States if the appeal is taken within sixty days. Such appeals to the Supreme Court shall have priority in hearing and determination over all other causes except criminal causes in that Court.

States, 243 U. S. 412; *Piedmont & Northern Ry. Co.* v. *United States,* 280 U. S. 469; *Standard Oil Co.* v. *United States,* 283 U. S. 235, and others. In *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82, it was held that "any order" does not include an order fixing the date of a hearing before the Commission. In *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438, it was held that the words do not include an order declaring the tentative valuation of the property of a railroad company. In *United States* v. *Los Angeles R. R.,* 273 U. S. 299, it was held that the words do not include an order fixing a final valuation of a railroad company's property. In *Great Northern Ry.* v. *United States,* 277 U. S. 172, it was held that certificates issued by the Commission to the Secretary of the Treasury under Section 209, Transportation Act, 1920, stating the amount of the guaranty during the six months following the termination of federal control, were not orders within the meaning of the Urgent Deficiencies Act.

The fundamental principles underlying the foregoing decisions were enunciated by this Court in *Procter & Gamble* v. *United States,* 225 U. S. 282. That case involved the question of whether or not the Commerce Court had jurisdiction over an order of the Commission dismissing an application for a reparation order based on alleged undue prejudice and a claim for damages resulting therefrom. In construing the statute, this Court expressly stated that the power thereby con-

ferred to set aside and annul orders of the Commission goes no further than the power to enforce its orders, saying (pp. 293–294):

> Thus, the first subdivision provides for the enforcement of orders, that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission, and the second (the one with which we are concerned) dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph. In other words, by the cooperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order. The other provisions of the act are equally convincing. Thus, § 3 (208) provides that the mere pendency of a suit to enjoin, set aside, annul or suspend an order of the Commission "shall not stay or suspend the operation of such order" but confers upon the court the power, under circumstances stated, to restrain or suspend in whole or in part the operation of an order. The same section, moreover, causes the meaning of the provision, if possible, to become clearer by making a finding that irreparable injury will result from the operation of an order

> ought to be enforced essential to the granting of an order or injunction restraining or suspending its enforcement

Upon the reasoning of the foregoing opinion rests the decision in *United States v. Illinois Central R. R. Co.*, 244 U. S. 82, 92, holding that an order issued by the Commission which set down for hearing complaints filed with it was not an order within the meaning of the statute and reversing the decree of the specially constituted District Court which had enjoined and annulled the order. This Court said (p. 89):

> It will thus be observed, as said by counsel for the Commission, "the power of a court to stay the enforcement of an illegal order is, in a sense, reciprocal to its power to enforce compliance with an order of the Commission, 'if lawful.' * * * And just as the district court would have been powerless, in the instant case, to compel the appellee to attend the hearing with respect to which the notice had been given, so also was it without lawful authority to annul that notice or to enjoin the Commission from proceeding in the premises."[1]

Applying the foregoing principles to the instant case, it is patent that the Commission's order was not a reviewable order. The Commission merely ordered (R. 20) "That Sixth Revised Page 139 of said schedules, be, and it is hereby, stricken from

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[1] But compare *The Chicago Junction Case*, 264 U. S. 258.

the files of this Commission." This order is not directed to the carrier and does not require the carrier to do or refrain from doing any act. There is no possible way in which a court could be called upon to enforce that order because there is no way in which the order can be obeyed or disobeyed. If, as this Court has said, the power of a statutory three judge court to enjoin and set aside orders of the Commission is "coextensive" with the power to enforce those orders, this order cannot be enjoined or set aside because it is not susceptible of enforcement.

The court below avoided this question by saying that the order was affirmative in effect and, by necessary implication, required appellants to cease using the tariff in question (R. 329). But this view ignores the fact that neither the order nor its implications can be enforced against appellants. Appellants continued after the date of the Commission's order to carry on the practices covered by the stricken tariff (R. 83-84). Obviously, the order is not one which they can be prosecuted for violating, and if they are subject to any prosecution, it is for violating the specific provisions of the statute. This Court held in *Lehigh Valley Railroad Co. v. United States*, 243 U. S. 412, that a dismissal order which left a railroad in such a position as to require it to change its methods of operation or be in violation of the statute was not an order having an affirmative effect which could be reviewed.

Furthermore, the present order cannot be reviewed because no relief can be given by the court. From the date of issuance the order was no more than a statement showing that the tariff *had been stricken from the files* of the Commission. The act of striking the tariff is now a completed act which is a matter of history. Perhaps a proper court could by mandamus compel the Commission to restore the tariff to the files if, after appropriate consideration, it should be found that the order of the Commission was void and that the Commission had an absolute duty to keep the tariff in the files.[6] But a court whose jurisdiction is limited to enjoining, setting aside, and annulling orders certainly cannot give any effective relief because there is nothing to enjoin, and such a court is powerless to issue any decree which will replace the tariff in the files of the Commission.

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[6] In *Garfield* v. *Goldsby*, 211 U. S. 249, this Court held that mandamus was the proper remedy to compel the Secretary of the Interior to restore a name to a list from which he had stricken it, because the act of striking was wholly without authority of law. See also *Denby* v. *Berry*, 279 Fed. 317.

However, the question of whether or not an order is reviewable does not depend on whether mandamus or any other remedy is available to the complaining party. *United States* v. *Interstate Commerce Commission*, 294 U. S. 50; *Interstate Commerce Commission* v. *United States*, 289 U. S. 385. In both of these cases this Court held that mandamus should not be granted and, at the same time, clearly indicated that no other remedy was available.

The court below impliedly admitted that it could not issue a decree in the form of an injunction but intimated that, in its opinion, the words "set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" in the statute were sufficient to give jurisdiction to review the present order (R. 328–329). This doctrine is broad enough to permit judicial review of *any order* of the Commission and is therefore contrary to the express pronouncements of this Court (*supra,* pp. 17–18). Furthermore, such a doctrine must be founded on the theory that the review by a statutory three-judge court is in the nature of an appeal from the Commission's order. But every decision of this Court interpreting the provisions of the statute relating to review of orders of the Commission clearly indicates that the proceeding is fundamentally an equity proceeding, the purpose of which is not to determine the abstract validity of orders but to prevent the future enforcement of invalid orders.[7]

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[7] In *United States* v. *Los Angeles R. R.*, 273 U. S. 299, this Court, in discussing the jurisdiction of a statutory three-judge court under the Urgent Deficiencies Act to review orders of the Interstate Commerce Commission, stated that the Commission's "conclusions, if erroneous in law, may be disregarded. But neither its utterances nor its processes of reasoning, as distinguished from its acts, are a subject for injunction." In *Edward Hines Trustees* v. *United States*, 263 U. S. 143, it was held that parties complaining of orders of the Commission cannot maintain a suit against such orders unless they can show "that the order

The government does not contend that the order involved in this case is a "negative order" in the sense that it merely amounts to a refusal by the Commission to take jurisdiction or to hear a complaint. Neither is it contended that the order is "no order" in the sense that the Commission did not make any utterance which in form purported to be an order. Our position is that the fundamental infirmity in appellants' suit is that the order attacked does not present a factual basis essential to enable a statutory three-judge court to grant relief—that is, appellants do not and cannot show that there is either threat or possibility of enforcement of the order or of punishment for disobedience of it. Neither do they show, nor can they show, that a decree issued by a statutory three-judge court will prevent any act or any threatened act which will cause appellants any legal injury. Hence, there is neither ground nor occasion for an injunction, because there is nothing which the court's decree can prevent or compel.

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alleged to be void subjects them to legal injury, actual or threatened." Likewise, it was apparently the view of this Court in *Alabama* v. *United States*, 279 U. S. 229, that the "pertinent principles of equity" are to be applied by the specially constituted district courts and followed in suits seeking relief from orders of the Commission, just as those principles are applied by other courts sitting in equity.

II

THE TARIFF WHICH THE COMMISSION STRUCK FROM ITS FILES WAS NOT SUCH A TARIFF AS MAY BE FILED WITH THE INTERSTATE COMMERCE COMMISSION

A. THE TARIFF DID NOT COMPLY IN FORM AND SUBSTANCE WITH THE REQUIREMENTS OF SECTION 6 OF THE INTERSTATE COMMERCE ACT

Section 6 (1) of the Interstate Commerce Act provides in part:

> Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which

> in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.

It is obvious that this section contemplates that only three types of tariffs shall be filed with the Commission—(1) tariffs between different points on the carrier's own lines; (2) joint tariffs as established by two or more carriers between points on the line of one and points on the lines of the other; and (3) separately established tariffs of two or more carriers where there is a through route but no joint tariff.[8] The section further provides that the carriers shall include in such tariffs all extra charges, services, and facilities connected with the transportation covered by such tariffs.

The tariff here in question provides (R. 20–A):

> SWITCHING AT FORT BENNING JUNCTION, GA.
>
> Reciprocal Switching
>
> Fort Benning Junction, Ga., switching limits will include the receiving and delivery tracks at the Fort Benning Military Post.

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[8] In *Denver & R. G. R. Co.* v. *Interstate Commerce Commission*, 195 Fed. 968, 973, the Commerce Court stated:

> The sixth section of the Act recognizes three kinds or classes of rates, namely, the rates between different points on each carrier's line, the joint rates of two or more carriers when they have established through routes and joint rates, and the "separately established rates" applied by a carrier on through traffic when there is a through route but no joint rate.

It is not contended by appellants that this tariff is or has any relation to either a joint tariff or a separately established tariff. The tariff cannot be a joint tariff because it does not comply with Section 6 (4) of the Act.[9] Neither can it be a separately established tariff over a through route because it does not comply with the provisions of Section 6 (1) of the Act as set out above in that this tariff establishes a single rate and does not show that any part thereof is allotted to or charged by a separate carrier. Consequently if the tariff is such a tariff as may be filed at all under Section 6 (1), it must either be a tariff covering transportation between points on the carrier's own line, or a tariff covering a facility, service, or privilege rendered in connection with transportation between points on the carrier's own line.

Superficially the tariff does not purport to set out the Seaboard's rates to and from Fort Benning. But by including Fort Benning within the switching limits of Fort Benning Junction, the rates between all other points and the Junction are made applicable to the Fort. Consequently, there

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[9] Section 6 (4) provides:

> *Joint tariffs.* The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

would seem to be no question but that the tariff is in effect a schedule of "all the rates, fares, and charges for transportation" between all points on the Seaboard and the receiving and delivery tracks at Fort Benning.

In determining whether or not appellants are entitled to have on file such a tariff, it is necessary to determine whether or not Fort Benning is a point on the lines of the Seaboard which will permit this tariff to be classified as a tariff between points on the carrier's own lines. The answer to this question depends upon what ultimate conclusion must be reached from the undisputed facts as to the geographical location of the Fort with relation to the Junction, the character of the Fort, e. g., whether or not it can be regarded as an industrial plant or operation, the character of the traffic to and from the Fort, as bearing upon the question of whether the line can be regarded as a spur or plant facility, the previous transportation service available between the Junction and the Fort and the competitive relation between the Seaboard and the Central in this territory.

Fort Benning Junction is a point on the lines of the Seaboard Railway and the Central Railway approximately four miles southeast of Columbus, Georgia (R. 2). Some six miles from that point is located Fort Benning (R. 2). The Commission in its report states (R. 14):

> Fort Benning is not an industry and may more properly be described as a small city

or town. It has a population of between 7,500 and 8,000, including officers and their families, enlisted men and their families and civilian employees and their families, and approximately 1,000 head of stock, horses and mules, are stationed at the fort. The Army's Infantry School and Tank School are both at Fort Benning, and recently it has been used in connection with activities of Civilian Conservation Corps employees. The inbound and outbound freight consists of the many articles necessary to the subsistence of the inhabitants and equipment used in military activities in addition to a large amount of building material used in connection with erecting permanent buildings. About one half of the inbound shipments, which total approximately 2,800 carloads per year, are moved on government bills of lading, the balance on commercial bills of lading. No industrial operations are conducted within the reservation.

The federal government owns a line of railroad 6.8 miles in length, extending from Fort Benning to Fort Benning Junction and there connecting with the Seaboard Railway and the Central Railway (R. 229). At the Fort the government has constructed a system of receiving, delivering, and switching tracks to be used in connection with transportation over its line (R. 221). For about eight years immediately preceding September 2, 1932, the government's railroad was operated by the

Central under a revocable license from the Secretary of War (R. 229). On September 2, 1932, the license of the Central was revoked, and since October 18, 1932, the line from Fort Benning to Fort Benning Junction has been operated by private contractors Page and Harris (R. 229). The Seaboard does not and never has operated train service between Fort Benning Junction and Fort Benning.

It is submitted that on the basis of the foregoing facts the Commission had no choice but to find as it did on the basis of the testimony presented at the hearing that Fort Benning was not a point on the line of the Seaboard and therefore the Seaboard had published a tariff to a point not on its line (R. 16). This finding of fact was adopted by the court below and made a part of its findings (R. 337). Since the finding is one of fact which the Commission had to make in order to determine whether or not the tariff was a tariff which might be filed under the provisions in the Interstate Commerce Act and appellants do not challenge the finding as unsupported by evidence, it is submitted that the finding should not be reversed by this Court.

It is true that appellants, in arguing that the tariff does not violate Section 6 of the Act, apparently contended that Fort Benning is on the line of the Seaboard (appellants' brief, pp. 24–38). It does not appear that any claim is made that the

Commission's finding on the point was not supported by substantial evidence. Rather, the gist of the contention seems to be that the Commission in making the finding stated that Fort Benning could not be reached by the Seaboard, which statement appellants contend is contrary to the true facts and therefore proves that the Commission's finding was erroneous (appellants' brief, pp. 25–29). We do not believe that this contention raises any question open for consideration in this Court, but aside from that we submit that there is no merit in appellants' argument for the reasons now to be considered.

Appellants directed the Commission's attention to a certain contract entered into between the Seaboard and Page and Harris, the contract operators of the Fort Benning Line (R. 21–28). Paragraph 8 of that contract provides (R. 24):

> If, as and when the Railway so desires, but subject to approval by the Secretary of War, the Railway shall have the right to operate switching service with its own engines and crews over the tracks leased to and maintained by Contractors between Fort Benning Junction, Georgia, and the designated receiving and delivering track at the Fort Benning Military Post, the Railway paying to the Contractors a fair and reasonable compensation for the use of the Contractors' facilities.

Subsequently, the Assistant Secretary of War approved the contract in the following terms (R. 25–26):

> Approved, subject to revocation at will by the Secretary of War, as regards the provisions of paragraph 8 of the foregoing contract, subject to the reservation specified in paragraph 14 thereof, and further subject to the condition that Page and Harris, as Government contract operators of the Government-owned Fort Benning Railway facilities, shall ever hold themselves out as ready and willing to contract, on similar terms, with the Central of Georgia Railway and/or any other common carrier railroad.

The Commission considered the contract and made the following observation (R. 17):

> The Seaboard contends that by this endorsement the War Department has given approval to that company to operate the Fort Benning line whenever it so desires. We do not so construe it. The endorsement was an approval of the terms of the contract, but granted no rights to the Seaboard to operate over the track in question. Manifestly the War Department could take no action on a subject matter which the Congress has placed under our exclusive jurisdiction.

So far as the Commission was concerned, the pertinent question was not what rights as between interested individuals the Seaboard acquired by virtue of the contract but whether or not a rail-

road by private ~~control~~ contract can place on its lines a point which was not previously on those lines. There can be but one answer to that question. The Interstate Commerce Act fixes the lines of railroads because the railroads are deprived of the power to change those lines without first obtaining authority from the Interstate Commerce Commission. Section 1 (18) prohibits the extension or abandonment of lines without the approval of the Commission. No contention is made that the Commission has authorized the Seaboard to change its lines so as to reach Fort Benning. Without that authorization no private agreement entered into by the railroad can change the line so as to reach a point not on the line. See *Transit Commission* v. *United States,* 289 U. S. 121; *Louisiana, A. & T. Ry. Co. Operation,* 170 I. C. C. 602. Any other result would nullify the whole purpose of the Interstate Commerce Act. A railroad one hundred miles long could branch out so as to include on its lines any point in this country by merely entering into private agreements granting it trackage rights to such point. Under appellants' theory such a point would necessarily become a point on the line of the carrier and any finding to the contrary would be wrong.

Even appellants, at the time when they filed the tariff, were apparently of the opinion that Fort Benning was not a point to which they were en-

titled to file a schedule of fares, rates, and charges. The tariff is not drafted in the form of the ordinary tariff stating fares, rates, and charges to points on the line. Instead, it purports to state "reciprocal switching" at Fort Benning Junction, and provides that the switching limits of Fort Benning Junction shall include the receiving and delivering tracks at Fort Benning (R. 20–A). The theory of such a tariff must be that it offers a service, facility, or privilege given in connection with transportation to and from Fort Benning Junction. Obviously this service, facility, or privilege is free transportation to and from Fort Benning, which is a point not on the line of the Seaboard Railway.

The question then is whether the Interstate Commerce Act permits a railroad to file a tariff offering transportation to a point not on its lines by couching the tariff in the form of offering a facility in connection with transportation to points on the line. We submit that the express purposes of the Act can not be evaded by any such subterfuge. The Commission, in finding that the tariff was unlawful because it amounted to a publication of rates to a station not on appellants' lines, expressly negatived any conclusion that the tariff could be interpreted as offering a service or facility at Fort Benning Junction. Since this finding involved a construction of the tariff which is a question primarily within the jurisdiction of the Commission, that construction should not be reversed unless it is clearly without foundation. See *Standard Oil Co.* v.

United States, 283 U. S. 235; *Texas & Pac. Ry. Co.* v. *American Tie & Timber Co.,* 234 U. S. 138; *Famechon Co.* v. *Northern Pac. R. Co.,* 23 F. (2d) 307.

But even if the tariff is read literally as offering a service or facility in connection with transportation to Fort Benning Junction, it is not a proper tariff under Section 6 (1) of the Act, because, as will be pointed out, the service, facility, or privilege offered has no connection with transportation to and from Fort Benning Junction.

The applicable part of Section 6 (1) provides:

> The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.

It would seem evident that the types of services, facilities, and privileges referred to are those directly connected with and pertaining to the transportation between the point of origin and the destination point of shipment. So far as transportation over the railroad is concerned, both of

those points must be on the line of the railroad. Consequently, the service rendered must be rendered on the line in order to be connected with and pertinent to the actual transportation.

Appellants have argued at some length that both the Commission and the courts have approved of carriers offering "off line" services (appellants' brief, pp. 30–35). Their argument consists of pointing to numerous Commission reports and decided cases which they interpret as covering the exact situation here involved. But, as will presently appear, none of the reports and cases cited are applicable here. The distinction is that each of the instances cited by appellants involved "off track" service offered by the carrier as distinguished from the "off line" service offered by appellants' tariff. Neither the courts nor the Commission has consistently observed such a distinction in the language used when speaking of particular situations, but the distinction is one which most accurately describes the results of the decided cases and, although frequently difficult of application, has a fundamental basis in both precedent and principle.

"Off track" services are a development from the physical limitations of common carriers by rail. Obviously, a railroad can only run its trains to points reached by tracks. As a general rule the tracks of a railroad serving any particular city only pass through a small area of the city, and consign-

ments must be loaded and unloaded at the points reached by the tracks. However, it may reasonably be said that since the city is served by the line, other parts of the city than those immediately adjacent to the tracks are, in reality, on the line of the railroad. Consequently, the railroad may perform services in those parts of the city which are not physically adjacent to its tracks but are nevertheless on its line. But appellants clearly confuse and misconceive the principle of those cases, for if, as appellants conclude, the cases are authority for the proposition that a carrier may extend its services as it chooses, then the whole purpost of Section 1 (18) is readily defeated.

Appellants cite a number of cases which they contend are authority for the proposition that a carrier is entitled to give "off line" service whenever it chooses and that the Commission has no control over the carrier's election to do so (appellants' brief, pp. 30–35).

A careful analysis of these cases reveals that neither the courts nor the Commission has ever intended to sanction the extension of carriers' transportation service to points *off* of its existing and fixed line in any decision that has been rendered since the enactment by Congress of the Transportation Act of 1920, c. 91, sec. 402, 41 Stat. 477, which denied interstate carriers the right to extend, abandon, or change their lines in any way without the express authorization of the Interstate Commerce Commission. In classifying the cases cited by ap-

pellants, it will be noted that *Vicksburg etc. Ry. Co.* v. *Anderson-Tully Co.*, 256 U. S. 408; *United States* v. *B. & O. R. Co.*, 231 U. S. 274; *Cattle Raisers Asso.* v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. 277; *Federal Sugar Refining Co.* v. *B. & O. R. Co.*, 17 I. C. C. 40; and *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, are all cases which were instituted prior to the Transportation Act of 1920 which added paragraphs 18–22 to Section 1 of the Interstate Commerce Act. Paragraphs 18 to 22 of Section 1 are the provisions of the Act which prohibit a railroad from extending, abandoning, or changing its lines in any way without authorization from the Commission. Prior to 1920, when those sections were added, carriers were free to extend their lines into any territory which they might choose without obtaining permission from the Interstate Commerce Commission and without violating any provisions of the federal law.[10] The citation of these earlier cases is, therefore, of no aid to appellants' case.

The remainder of appellants' cases may be classified in three categories. In the first category are the "pick up and delivery service" cases which involve the practice of giving store door pick up and delivery service by truck at terminal points on the lines of common carriers by rail. These cases are instances of "off track" services (see *Central*

[10] See *Detroit Terminal R. Co.* v. *Pennsylvania-Detroit R. Co.*, 4 F. (2d) 705, affirmed (C. C. A. 1926) 15 F. (2d) 507, cert. den. 273 U. S. 758.

Transfer Co. v. *Terminal Railroad,* 288 U. S. 469) which are given at the terminal points and are part of the transportation between those points, for, as pointed out by the District Court for the Southern District of New York in *Merchant Truckmen's Bureau of New York* v. *Reardon,* 10 F. Supp. 358, "By force of paragraph (3) of Section 1, 49 U. S. C. A., Section 1 (3), both line haul and store door delivery are parts of the same transportation." Furthermore, the courts have clearly indicated that such service can be rendered without a certificate of public convenience and necessity as long as the service is part of the terminal or line haul service, but that if such service goes beyond terminal or line haul service, it is not permissible unless authorized by the Interstate Commerce Commission. *New York Dock Ry.* v. *Pennsylvania R. Co.,* 1 F. Supp. 20; *New York Dock Ry.* v. *Pennsylvania R. Co.,* 62 F. (2d) 1010.

The second category is that which includes the constructive terminal cases. The principal cases in this class are those involving off-track terminals in the metropolitan area of New York City. The Commission has pointed out that the transportation service at New York City creates a unique situation without parallel any place else in this country. *Constructive and Off-Track Freight Stations,* 156 I. C. C. 205, 207; *Lighterage and Storage Regulations at New York,* 35 I. C. C. 47, 52, 53. This may explain to some extent the latitude which has been permitted in applying the constructive

terminal theory to New York City. However, the important point which should be noted is that this theory rests on the premise that such constructive terminals are merely other points *at the terminus* of a railroad where transportation services may be rendered in connection with the line haul transportation to that particular terminus. In determining whether or not a carrier may establish constructive terminals without authorization from the Interstate Commerce Commission, the courts have indicated that the determining factor is whether the carrier is extending his line into new territory or is merely giving the public additional service at a point on its line in connection with the transportation which it is already offering. See *New York Dock Ry.* v. *Penna. R. Co.*, 62 F. (2d) 1010. In this connection it should be noted that Fort Benning Junction is not a city but merely a switching point in open country on the lines of the Seaboard and the Central (R. 199).

The last category is that which includes such cases as those involving spur or industrial tracks to stockyards, mines, manufacturing plants, etc. Those cases which involve transportation to stock yards do not support appellants' position, because such transportation is not only authorized but is required by Section 15 (5) of the Act. The decisions involving terminal switching or car spotting on spur or industrial tracks clearly have no application to this case for the Commission found and the record shows that Fort Benning is not an

industry or plant within the terminal area of Fort Benning Junction, but a small town located over six miles therefrom (R. 209, 282–283). Moreover, even spur or industrial track deliveries within switching or terminal districts do not include "deliveries through a system of interior switching tracks constructed as plant facilities," nor every case of spur track delivery regardless "of the location and extent of the spur tracks and the character of the movement." *Los Angeles Switching Case,* 234 U. S. 294, p. 310; *New York Central & H. R. Co.* v. *General Electric Co.,* 114 N. E. 115, pp. 118, 119 (cert. den. 243 U. S. 636).[11]

[11] As contradistinguished from the cases cited by appellants (appellants' brief, pp. 30–35) there are numerous cases in which the Commission and the courts have held that a carrier could not extend its tracks so as to give service at points quite close to the main tracks over which the carrier was operating unless authorized to do so by the Commission. *Texas & Pac. Ry* v. *Gulf, Etc., Ry.,* 270 U. S. 266 (extension 7.5 miles); *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.,* 286 Fed. 540 (extension 3.75 miles); *Eldorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 5 F. (2d) 777 (extension 1,500 feet); *Missouri Pacific R. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 41 F. (2d) 188 (extension 3,700 feet). See also *Public-Convenience Application of A. & S. A. B. Ry.,* 71 I. C. C. 784 (abandonment of 1.89 miles of track); *Chicago, St. L. & N. O. R. Co. Abandonment,* 202 I. C. C. 297 (abandonment of 3.925 miles of track) and *Louisiana, A. & T. Ry. Co. Operation,* 162 I. C. C. 766, 170 I. C. C. 602 (acquirement of trackage rights by contract).

Comparing the foregoing cases with the cases cited by appellants, it is apparent that distance is not the determining factor in deciding whether or not a carrier must obtain authorization from the Commission before it can give transportation service to a point not heretofore reached by the

It is submitted that neither the courts nor the Commission has ever intended to sanction the giving of common carrier services at points not on the lines of the carrier. As was said, *supra,* at p. 33, the Interstate Commerce Act fixes the lines of railroads and does not contemplate that those lines shall reach into new territory or be in any way changed without express permission from the Interstate Commerce Commission. If a railroad is entitled to move on to its lines a point previously off its lines by merely extending its switching limits, then there is no limit to the distance which the lines may be extended in this manner.

This all comes back to the question of whether or not Fort Benning is on the line of the Seaboard. The Interstate Commerce Commission found that Fort Benning was not on the lines of the Seaboard. The District Court sustained that finding and it is submitted that this Court must likewise conclude that appellants' tariff is an attempt to extend the lines of the Seaboard to a point not on those lines.

B. THE TARIFF OFFERS A SERVICE WHICH CANNOT LEGALLY BE PERFORMED

But even if it be assumed, *arguendo,* that appellants' tariff is a tariff so composed as to be a type of tariff that could be filed under Section 6 (1) of

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tracks of the carrier. These cases also demonstrate that a carrier cannot extend its transportation service to any point which it chooses by merely commencing operation to that point. In this connection the language in *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. 540, 546–547, is particularly enlightening.

the Interstate Commerce Act, there is another very cogent reason why this tariff was not entitled to a place in the Commission's files. Summarily stated, the reason is that the tariff is an illegal tariff because it covers transportation prohibited by Section 1 (18) of the Act, and therefore the tariff is not entitled to a place in the files of the Commission.

Section 1 (18) provides:

> No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad. * * *

Section 1 (22) provides:

> The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or

> parts of a general steam railroad system of transportation.

The effect of these two sections is to make it illegal for carriers to engage in certain kinds of transportation without authorization from the Commission unless that transportation is within the express exceptions carved out of the general prohibition. The Commission found that appellants in furnishing the transportation covered by the filed tariff here involved were engaging without the requisite authorization in transportation prohibited by Section 1 (18) and not within the exceptions of Section 1 (22). In its report the Commission stated (R. 13):

> The fact that the Seaboard has by the tariff here considered extended its line over the government-owned railroad to the fort is not open to question. Does this constitute such an extension that a certificate is necessary, or does it fall within the exceptions in section 1 (22)?

The Commission then proceeded to discuss the pertinent evidence bearing on this question (R. 14–15) and concluded by stating (R. 14):

> We are of opinion and find that the operation of the line between Fort Benning Junction and Fort Benning falls under the provisions of section 1 (18) of the Act and that before the Seaboard could lawfully operate the line in question a certificate of convenience and necessity would first have to be obtained.

Likewise the court below made findings of fact that (R. 338):

> 6. The line from Fort Benning Junction to Fort Benning is not a spur, industrial, switching, or side track as defined in Section 1 (22) of the Interstate Commerce Act. The haul from the junction to the Fort is a line haul service extending beyond the point that the Seaboard or any other railroad is entitled to operate and to which point beyond the junction no tariff as a line haul applies.
>
> 7. The Seaboard has not received a certificate of public convenience and necessity to extend its line from the junction to the Fort.

The evidence which supports these findings has been previously set out (*supra,* pp. 28–30). Since appellants do not contend that the findings are not supported by sufficient evidence, it would be useless repetition again to repeat the evidentiary facts supporting the ultimate findings. Consequently the question to be considered is whether or not a tariff which offers a transportation service prohibited by the Act is an illegal tariff not entitled to a place in the Commission's files.

The provision in Section 6 (1) for filing tariffs with the Commission was inserted in the Interstate Commerce Act by the Act of June 29, 1906. The purpose of that provision was to provide for a permanent file of all tariffs so that any person desiring to do so might consult the file and find what trans-

portation, charges, services, facilities, and privileges were available and in effect on the lines of any particular carrier. Furthermore, Section 1 (4) of the Act makes it mandatory for carriers to give shippers all transportation services, facilities, and privileges covered by filed tariffs.

The effect of these two sections is to require that a tariff be filed to cover every act which a carrier is offering to perform for shippers and to compel the railroad to perform such acts for every shipper. Obviously, this does not contemplate that a carrier shall by filing the tariff hold itself out to the public as giving a service which is prohibited by the Interstate Commerce Act. Consequently any tariff of that nature, as well as the provisions of the statute requiring that the service offered by the tariff be performed, must give way to the express provision of the statute prohibiting performance of the service. Otherwise there would be created an anomalous situation in which the carrier would be compelled by law to do an act which is forbidden by law. Under such circumstances the Commission's files would obviously be misleading if they contained such a tariff. *Atchison, T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, 98.

That appellants' tariff presents this situation is apparent. Section 1 (18) of the Act forbids appellants to extend their lines as they have attempted to do by contract with Page and Harris. The tariff which they have filed covers this forbidden extension and offers transportation over the ex-

tension. Consequently the tariff and the statutory provision requiring that the service offered by the tariff be performed must give way to the express prohibition of the statute, making such service illegal.

The Commission, however, after finding that the tariff was illegal because it covered a service prohibited by Section 1 (18), did not make any order on the basis of that finding. The Commission was apparently impressed with the appellants' contention that an order made on that ground would be an attempt to enforce Section 1 (18) and that under the holding in *Texas & Pac. R.* v. *Gulf, Etc. Ry.,* 270 U. S. 266, the exclusive method of enforcing Section 1 (18) was contained in Section 1 (20), and the Commission was therefore without power to make an order enforcing Section 1 (18). However, the court below was not impressed by appellants' contention, and on the basis of *Southern Pacific Co.* v. *Interstate Commerce Commission,* 200 U. S. 536, and *Wallower* v. *United States,* 32 F. (2d) 524, held that it was not bound by the reasons assigned by the Commission for making the order and could sustain the order if the Commission's report contained findings of fact which would support the order on any theory (R. 333–335). Since the Commission had found that the tariff covered an offer of transportation which could not be legally performed by appellants, the court concluded that the tariff was an illegal tariff

and that it violated Section 1 (18) of the Interstate Commerce Act.

On the basis of that conclusion the court below had no hesitation in holding that the illegality of the tariff was a sufficient reason to justify the Commission's order striking the tariff from the files, saying (R. 333):

> It must be borne in mind that there was no urge that the Commission enjoin the violation of Section 1 (18) but merely that the tariff be cancelled. Uncancelled it apparently panoplies the Seaboard against attack in courts for violation of Section 1 (18). Surely the Commission must have authority after declining the issuance of a certificate of convenience and necessity to prevent the continuance of the use of its files and its apparent approval of a scheme to defeat its formal decision. No one contends that the Commission can enjoin the Seaboard from either directly or indirectly Section 1 (18), any more than it could punish it criminally. But it can hardly be contended that the Commission must unwillingly acquiesce in fortifying a scheme it disapproves.

As pointed out by the District Court, the pertinent question is whether or not the tariff is illegal because it covers transportation prohibited by Section 1 (18), and there is no need to consider whether or not Section 1 (20) provides an exclusive remedy by court injunction for violations of

Section 1 (18).[12] Considering the case from this angle, it is not material what remedy is provided for violations of Section 1 (18) or whether any remedy is provided for violations of that section. The only question is: What may the Commission do to prevent its files from including a tariff which is illegal because it offers a prohibited transportation service? That question is fully discussed, *infra*, at pp. 52–55, and for the reasons there set forth it is submitted that the Commission may order such a tariff stricken from its files.

Appellants have argued that the necessary effect of the Commission's order is to restrain appellants from violating Section 1 (18) and therefore the Commission has encroached on the exclusive jurisdiction of the courts (appellants' brief, pp. 45–55). Without considering whether or not the exclusive remedy for violations of Section 1 (18) is vested in the courts, it is submitted that the Commission's order does not and can not have the effect which appellants say it has. It will be noted that after the Commission ordered the tariff stricken from the files, appellants continued to give the service which is covered by that tariff (R. 83–84). It is not contended that in so doing appellants violated

[12] In *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U. S. 266, 272, this Court stated that the Commission may pass upon the question of whether or not a proposed extension is within the terms of Section 1 (18) whenever the determination of that question is incidental to the determination of the issues presented by a proper proceeding before the Commission.

the Commission's order or that it would be possible to enforce the Commission's order against the appellants in such a way as to compel them to cease giving the service in question.

The essence of appellants' complaint is that now that the tariff has been stricken from the Commission's files, they are left in violation of Section 6 (1) of the Interstate Commerce Act and are subject to prosecution and penalties for giving a service which is not covered by a filed tariff. Aside from the fact that appellants' complaint rests on their own election to violate Section 6 (1), we submit that it is no concern of the courts or the Commission that the Commission in removing an illegal tariff from its files has left a carrier in violation of some additional sections of the Interstate Commerce Act. See *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412.

Unquestionably the Commission must have power to reject tariffs which do not comply in form and substance with the requirements of the Act and the administrative rules and regulations of the Commission. But appellants argue that if the tariff covers a service which cannot legally be performed, the Commission has no authority to refuse to keep on file such tariff unless the Commission is also vested with jurisdiction to restrain the illegal acts contemplated by the tariff. The basis for this argument is that such refusal on the part of the Commission would be an attempt to do indirectly

that which it cannot do directly. We submit that any such contention is contrary to the spirit and purpose of the Interstate Commerce Act because the Act only contemplates that carriers shall file tariffs complying in form and substance with the Act and offering services which may legally be performed and which may be compelled by law after being offered.[13]

III

THE INTERSTATE COMMERCE COMMISSION DID NOT EXCEED ITS AUTHORITY BY STRIKING APPELLANTS' TARIFF FROM THE FILES

A. THE COMMISSION HAS POWER TO STRIKE FROM ITS FILES TARIFFS WHICH ARE LACKING IN REQUISITE FORM OR SUBSTANCE OR WHICH OFFER SERVICES THAT CANNOT LEGALLY BE PERFORMED

Appellants attack the Commission's order on the ground that the Commission had no power to strike the tariff from its files (appellants' brief, pp. 44–45). Their argument appears to be predicated, *first,* on the contention that the tariff was in all respects a legal tariff, such as Section 6 of the Act requires carriers to file, and, *second,* on the contention that regardless of the legality of the tariff the Commission has no power whatever to strike tariffs

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[13] The District Court also held that the Commission's order might be sustained because the arrangement between the Seaboard and Page and Harris would result in the unlawful impairment of the Seaboard's revenue. Appellants have argued this point in their brief (appellants' brief, pp. 55–63), but the government did not raise the issue in the court below and will not discuss it in this brief.

after they are once filed. The first proposition merely raises the question of whether or not the tariff is illegal. That question has been fully considered (*supra,* pp. 25–51), and it is submitted that, for the reasons there discussed, the tariff is clearly illegal. The only remaining question is whether or not the Commission has the power to strike from its files tariffs which violate the statutory provisions of the Interstate Commerce Act.

Section 6 (1) of the Act contains specific provisions as to who may file tariffs and what shall be covered by filed tariffs. Obviously, it is not contemplated that any person desiring to do so may file a tariff nor that any person may file a tariff covering matters not within the purview of the statute (see *supra,* pp. 25–27). The Commission certainly may reject any tariff which the Act does not require to be filed, and the party affected by that rejection has no relief. But, as a practical matter, it would be impossible for the Commission to accept or reject every tariff at the time it is offered. In the course of a year the Commission receives thousands of tariffs for filing, and it can not be expected to meet and scrutinize every tariff at the threshold and winnow out and reject those which it should not receive.

In view of these considerations, the Commission early adopted the practice of striking from its files tariffs which were not legally entitled to a place therein. The practice seems to have originated in

Atchison, T. & S. F. Ry. Co. v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92. In that proceeding the Commission was requested to and did strike from its files a tariff which had been filed with it.[14] The Commission stated (p. 98):

> The prayer of the complaint is unusual, but is not beyond our power to grant. If defendant is not a common carrier and its tariff is part of a scheme devised by shippers to secure under pretense of common carriage allowances otherwise illegal, the tariff should be canceled, and we may enter an order striking it from our files. Otherwise our files might prove misleading, which it is, of course, within our power to prevent.

And concluded by saying (p. 102):

> An order will be entered striking defendant's tariff from our files.

Subsequently the Commission was called upon to determine whether or not a tariff filed by 11 carriers subject to the Interstate Commerce Act was so phrased as to be a legal tariff. *Transportation of Waste Materials*, 34 I. C. C. 337. The Commission there said (p. 339):

> It might be added that tariffs providing for this disposal service might be so phrased as to eliminate many of the uncertainties and

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[14] Other instances of this practice may be found in *Wharfage, Handling, and Storage Charges at Municipal Terminals, Norfolk, Va.*, 59 I. C. C. 88; *Trackage Charge on Loaded Cars*, 60 I. C. C. 134; and *Mercer Valley R. R. Co.* v. *Pennsylvania Railroad Co.*, 69 I. C. C. 233.

> perplexities which attach to the service under the tariff proposed. Among these uncertainties is the question of whether or not a definite consignment and bill of lading should be made; in whom title of the slag vests; and when and where transfer of such title, if any, is effected. Should these matters be provided for in appropriate tariffs, they will have due consideration by the Commission. It is clear, however, that the tariffs as filed do not conform with section 6 of the act and must be ordered forthwith stricken from our files.

In the present case, the question before the Commission was whether or not appellants' tariff was illegal because the Act did not provide for its filing and because it covered a service which appellants could not legally perform. The Commission, having answered the question in the affirmative, followed its own precedent of striking illegal tariffs from its files.

The Interstate Commerce Act does not specifically state in so many words that the Commission shall have power to strike tariffs from its files. The Commission, however, is made the custodian of the tariff files. It is empowered to prescribe the form of tariffs which are to be filed, and it is required to keep those files open for public inspection. The files are for the benefit and protection of the public and the Commission is the instrumentality charged with the duty of protecting the public interest. To deny that the Commission has

inherent power to keep the files in an orderly and serviceable condition by striking out extraneous matter, including illegal tariffs, would be to nullify the very purpose of the Act in requiring tariffs to be filed.[15]

B. THE PURPOSE AND EFFECT OF THE COMMISSION'S ORDER WAS NOT TO RESTRAIN A SUPPOSED VIOLATION OF SECTION 1 (18) OF THE INTERSTATE COMMERCE ACT.

Appellants say that the order, tested by its purpose and effect, was an attempt by the Commission to restrain a supposed violation of Section 1 (18) of the Act and was therefore invalid because it amounted to an exercise of the power not delegated to the Commission but vested solely in the court (appellants' brief, pp. 41–44). This argument does not raise the question of whether the tariff is fundamentally illegal and not entitled to be filed because it covers a service which appellants are forbidden to render by force of the provisions of Section 1 (18). So, for the purposes of this argument, it must be taken as admitted that the tariff does cover a service which appellants are not entitled to give because they have not complied with

[15] In this connection it should be noted that Congress in granting certain specific powers to the Commission under Section 15 of the Act, with relation to orders requiring tariffs to be cancelled, did not limit the power of the Commission to make orders. Paragraph 14 of Section 15 specifically states:

> The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this chapter.

that section. The sole question is whether or not the Commission's order must be construed as an attempt to restrain appellants from giving the illegal service and thus to usurp a function which may only be exercised by the courts.

The government does not consider it essential to discuss whether or not, in a proper case, the Commission might be entitled to exercise a coordinate jurisdiction with the courts in preventing carriers from violating Section 1 (18) of the Act. It is sufficient to point out that in this case there is absolutely no factual basis for any surmise that the Commission was attempting to restrain a violation of Section 1 (18) or any other section of the Act.

The Commission's report clearly shows that the Commission, although finding that the tariff did cover a service prohibited by Section 1 (18) (R. 14), did not even base its finding that the tariff was illegal on that theory (R. 16). As said by Circuit Judge Sibley in his dissenting opinion in the court below (R. 340):

> The Commission distinctly disclaims as a ground for its order that the Seaboard is operating to Fort Benning without a certificate of public convenience, and concedes that a court injunction under Interstate Commerce Act, Section 1 (20) is the exclusive statutory remedy for that.

The Commission's purpose in making the order could hardly be more explicitly stated than by its language (R. 19):

> Upon consideration of the record, we find that the Seaboard tariff which extends the Fort Benning Junction switching district to include the receiving and delivery tracks at Fort Benning is unlawful, in violation of Section 6 of the Act, and should be stricken from the files of the Commission.

Appellants' argument is based largely on the theory that the part played by the Central in the proceedings before the Commission gives rise to the inevitable conclusion that the Commission was attempting to restrain a violation of Section 1 (18) (appellants' brief, pp. 41–43). But regardless of the Central's motives, the majority opinion below points out that (R. 333):

> It must be borne in mind that there was no urge that the Commission enjoin the violation of Section 1 (18) but merely that the tariff be cancelled. Uncancelled, it apparently panoplies the Seaboard against attack in the courts for violation of Section 1 (18).

Furthermore, any contentions or pleadings by the Central in its complaint to the Commission in regard to interpretation of the law would have no bearing on the validity of the Commission's order. The Central might urge an interpretation of the law which is erroneous, but the fact that such an

erroneous interpretation was urged would not prevent the Commission from taking action pursuant to a correct interpretation. In *Chicago, R. I. & P. Ry.* v. *United States,* 274 U. S. 29, this Court said (pp. 36–37):

> The contention is that the commission was without power to predicate its order on paragraph (13) of § 6 of the act, because there is no formal reference in the complaint to that paragraph nor an order for an investigation under it on the commission's own motion. But the allegations of the complaint in matters of fact were sufficient to authorize the commission to consider the case under that provision as well as others; and this is enough.

But aside from the Commission's purpose in making the order, the order does not have even the effect of restraining a violation of Section 1 (18) or restraining any other action by appellants. The order merely deletes from the Commission's files an illegal tariff. Appellants have continued to give the service which they were giving under the tariff (R. 83–84), and no one can contend that the order of the Commission herein challenged is being violated. That the order may leave appellants in violation of additional provisions of the Interstate Commerce Act is no concern of the courts in this proceeding. To adopt appellants' theory as to the effect of the order would be to hold that no matter how lacking a tariff may be in requisite form and

content, the Commission is powerless to do anything which would nullify that tariff unless the Commission has authority to restrain the operations covered by the tariff. Such a position would be untenable.

IV

THERE IS NO MERIT IN APPELLANTS' CONTENTION THAT THE COMMISSION'S ORDER LACKS THE REQUISITE CERTAINTY AND PRECISION NECESSARY TO VALIDITY

Appellants have made the contention that "the Order lacks the certainty and precision requisite to the validity of an Order of the Commission" (appellants' brief, pp. 38–41). Appellants say that "In declaring the tariff to be unlawful as in violation of Section 6 without designating the provisions of that section with which it is deemed to conflict or otherwise apprizing appellants of a specific violation of law with which they are charged, the order lacks the certainty and precision which are requisite to the validity of an order of the Commission" (appellants' brief, p. 19).

A careful scrutiny of the bill of complaint (R. 1–8) does not reveal that any claim was there made that the Commission's order was invalid for the reasons set forth in this portion of their argument. Neither do the assignments of error (R. 346–349) indicate that appellants are complaining of any ruling of the District Court on this specific point. Consequently, appellants are precluded from advancing this contention as a ground for this Court

to reverse the decree of the District Court and nullify the order of the Commission.[16]

But aside from the foregoing considerations, appellants' contention is not sound as a matter of law. Undoubtedly the Commission must make such findings of fact as are necessary to show with reasonable certainty the Commission's jurisdiction and its reasons for entering the order so that the court, in applying the law to those findings of fact, may determine whether or not the order is authorized. But the Commission is not required to spell out in minute detail every part of the statute under which it acts. In *Southern Pacific Co.* v. *Interstate Commerce Commission*, 200 U. S. 536, the Circuit Court had upheld a cease and desist order of the Commission on the ground that the order was valid under Section 5 of the Interstate Commerce Act, although the Commission had relied solely on Section 3 in making the order. The contention was

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[16] In *Kansas City Southern Ry. Co.* v. *United States*, 282 U. S. 760, a suit was instituted before a three-judge district court for the purpose of testing the validity of an order of the Interstate Commerce Commission. Although there were no allegations in the bill of complaint to that effect, it was argued to this Court on appeal that the order was an invalid attempt to regulate intrastate commerce. This Court disposed of the argument, saying (pp. 764–765):

> With respect to the contention that the Commission's order undertakes to regulate movements of office cars in intrastate commerce, it is enough to say that no such contention was made in the petition in this suit.

there made that the Circuit Court had no power to uphold the order on grounds different from those relied upon by the Commission, but this Court stated that even though the Commission had based its order on the wrong section of the Act, the courts could sustain the order if the facts found by the Commission disclosed that the order was justified under any section.

Obviously, the Commission is not required to designate some particular section of the Act which it considers to be controlling if it is not essential to the validity of the order that the Commission designate the right section.[17] As a matter of fact, any attempt by the Commission to point out the portions of the statute which it considers applicable is superfluous because, as said in *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665–666:

> This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency of the findings made in other proceedings before it.

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[17] In *Wallower* v. *United States*, 32 F. (2d) 524, a three-judge District Court, sitting in the Western District of Missouri followed the decision of this Court in *Southern Pacific Co.* v. *Interstate Commerce Commission*, *supra*, saying (p. 529):

> The court must go behind the reasons assigned by the Commission or its counsel, if need be, and determine for itself the validity of an order.

CONCLUSION

For the foregoing reasons it is respectfully submitted that that part of the decree of the District Court which dismisses the bill of complaint should be affirmed.

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DECEMBER 1936

APPENDIX

The Interstate Commerce Act (U. S. C., Tit. 49, Sections 1–27) provides in part:

> SECTION 1. (4) It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.
>
> * * * * *
>
> (18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or

operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

* * * * *

(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the pro-

visions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

* * * * * *

(22) The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

* * * * * *

SECTION 6. (1) Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points in its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in

force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

* * * * *

(4) The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

* * * * *

(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the

same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

U. S. GOVERNMENT PRINTING OFFICE: 1935